

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of)
SMR Systems)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

- and -)

Implementation of Sections 3(n))
and 322 of the Communications Act -)
Regulatory Treatment of Mobile)
Services)

GN Docket No. 93-252

- and -)

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding 800 MHz SMR)

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PP Docket No. 93-253

To: The Commission

COMMENTS OF
KELLER COMMUNICATIONS, INC.

Keller Communications, Inc. ("Keller"), through its attorneys and pursuant to the Commission's Second Further Notice of Proposed Rule Making, FCC 95-501, released December 15, 1995 ("Further Notice") in the above-captioned proceeding, hereby respectfully submits these Comments. As a small business entrepreneur and provider of private wireless (SMR) services, Keller is vitally concerned with the Commission's ultimate determinations in this proceeding. In support hereof, Keller submits the following:

Background

1. Keller is a small private wireless sales and service company serving the land mobile community in and around Dallas, Texas. Keller's SMR customer base includes private, local government and public safety entities. This proceeding, which considers the service and competitive bidding rules for the remaining 800 MHz SMR service, including the General Category channels, directly affects the entirety of Keller's 800 MHz trunked, general category SMR system, which is the "life blood" of Keller's business. Therefore, Keller is vitally concerned with the Commission's ultimate determinations in this proceeding.

Incumbent Licensees Must Be Grandfathered

2. It is Keller's strong suggestion that there should be no auction of licenses in the 800 MHz General Category. In mature markets such as Dallas, the channels are fully deployed and the maximum utility of the available spectrum is being realized. Other spectrum, such as unused UHF television channels and government spectrum, should be investigated first. It makes absolutely no sense to disrupt ongoing operations in a mature band, where spectrum efficiency is not going to result. The only possible reason for the instant proposal is to obtain government revenue. The tradeoff for that added revenue is the shunting off of small businesses, built up over years of effort with a lot of hard work, which are providing good service, to "reservations" which may or may not be equivalent. The disruption in the small business operations of companies such as Keller is significant. Antenna sites will be lost, replacements for which are not available. Large companies have the capacity to dominate the auction process, and small businesses such as Keller, notwithstanding any token "bidding credits" that might be permitted, will have

virtually no ability to compete. Far from increasing competition, the Commission's auction proposal for the 800 MHz general category channels will insure that no small business such as Keller's will ever have a chance to succeed again. The proposal is a bad idea, and it should be abandoned without further consideration.

3. Should the Commission move forward with licensing wide area commercial systems through auction procedures, incumbent licensees such as Keller must be "grandfathered" and be given primary licensing rights against the new wide area licensees with regard to interference protection. New licensees must either locate stations at least 70 miles from the facility of any co-channel incumbent, or comply with the Commission's Section 90.621 co-channel contour separation standards./¹

The Commission Must Ensure An Equitable Relocation Process

4. Although the Commission's *Further Notice* proposes that incumbent licensees would be provided with "comparable facilities" upon relocation, the Commission, if it adopts the proposal, must guarantee that the replacement spectrum is comparable *in every respect*, including propagation characteristics, to that which is forcibly vacated by the incumbent. The *Further Notice* proposes that a relocated incumbent would receive the same number of channels with the same bandwidth, have its entire system relocated (not just those frequencies desired by a particular EA licensee), and, once relocated,

¹ The Commission must also take steps to ensure that incumbent licensees are not precluded from ever modifying their service contours to respond to changing needs, whether it is the result of a shift in population patterns, equipment modifications or unforeseeable events.

have a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system; and suffer no costs in the process. These concepts are important -- but the Commission must do even more. The relocated service contours of the incumbent licensees must encompass all of the territory covered by the 22 dBu contour of their original systems. Otherwise incumbent licensees will experience a drastic reduction in actual service areas and populations. Also, the Commission should not force incumbent licensees to migrate from their current frequencies, and any migration should only be the result of voluntary negotiations between parties pursuant to the rules of the marketplace. Under no circumstances should an incumbent licensee be forced to migrate from an "upper" channel to a "lower channel." Such a "major change" of channel classification is inherently contradictory to the "comparable facilities" concept since it would jeopardize the efficiency of Keller's service to the public.

**Exact Relocation Reimbursement Criteria
And Procedures Are Critical To A Smooth Transition**

5. Although the Commission's *Further Notice* lists a variety of items that would be included in reimbursable "actual relocation costs," the Commission must adopt an exact method of determination to ensure that incumbent licensees are reimbursed immediately. If the Commission desires a speedy and smooth transition, it must ensure incumbent licensees that they will be made whole -- quickly and without the cost and burden of administrative or judicial litigation, which would quickly stifle any attempt by small business entities to protect themselves. Unfortunately, such has not been the case in other FCC-licensed services where channel relocations, enormously disruptive

of ongoing small business operations, require reimbursement by the benefitted licensee. This is particularly true in the broadcast field where numerous cost reimbursement situations have led to civil litigation and lengthy Commission appeals, delaying resolution and providing means of intimidation of the small business licensee. *See e.g., Peter Wayne Lechman, 72 RR 2d 1143 (MMB 1993)(a broadcast cost reimbursement matter that was originally filed with the Commission in 1991, and after both administrative appeals and a civil lawsuit - - some five years after its inception -- is currently before the Commission in the form of an "Application for Review.")*.

6. Reimbursement payments should be due when the incumbent licensee commences testing on its new channels. If the reimbursement payments were to be triggered by the progress of the EA licensee, the incumbent licensee would have to expend significant sums of money to modify its system without knowing when it would be reimbursed. If an incumbent licensee must move, it should not experience a financial drain as a result. The longer the Commission permits the reimbursement process to drag, the greater the possibility of controversy.

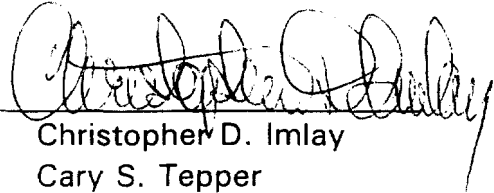
7. Keller supports the proposal to establish a binding arbitration or mediation process to resolve reimbursement controversies, provided that the Commission establishes clear, unequivocal guidelines and policies regarding reimbursement so that there can be no delay in providing reimbursement to the incumbent licensee. Such matters must be handled quickly and if the newcomer fails to cooperate fully and completely in the process, the Commission should have the authority to summarily revoke their license and forfeit the auction payment.

Conclusion

The public interest and safety require that present General Category SMR systems such as that operated by Keller continue to serve the public without disruption. The instant proposal should not be adopted. It is unwise and unnecessary in a mature band, in major markets, where spectrum efficiency is already at a maximum. There is no rationale for the disruption of existing licensed facilities. However, if the Commission does intend to proceed with an auction of the General Category frequencies, it must ensure that any system relocations are accomplished in an orderly fashion with prompt and enforceable cost reimbursement guidelines, and without cost or diminution of the utility of the replacement channels to the incumbent licensee. To do otherwise is no less inequitable than was the Government's taking of land and creation of inadequate reservations for the Native Americans in the early part of this century.

Respectfully submitted,

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